Supreme Court, U.S.
FILED

03137 2 MAR 29 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

DALLAS GLEN HILLS, LP, PETITIONER

v.

THOMAS ROKEBY CONYNGHAN CORFIELD, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN L. HUBBLE
HUBBLE & PISTORIUS
5956 Sherry Lane
Suite 800
Dallas, Texas 75225
(214) 361-1262

HARVEY JOSEPH
Counsel of Record
THE LAW OFFICES OF
HARVEY G. JOSEPH
P.O. Box 814085
Dallas, Texas 75381
(214) 880-8151

Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1332 and this Court's decision in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) require the consideration of the citizenship of every underwriter subscribing to a Lloyd's of London policy in determining whether complete diversity of citizenship exists in a lawsuit brought in Federal Court involving solely state law claims?

2. In an effort to defeat the requirement of complete diversity may a Lloyd's of London lead underwriter amend its petition to drop its representation of the other underwriters subscribing to a Lloyds of London policy and proceed only in an individual capacity, ignoring both the fact that the other underwriters are real and indispensable parties and this courts bright line rule in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) that an unincorporated business entity is to be treated as a citizen of every jurisdiction in which any member is a citizen?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed below. To Petitioners' knowledge, Dallas Glen Hills LP has no parent companies or non-wholly owned subsidiaries.

Dallas Glen Hills LP, Defendant/Petitioner

Thomas Rokeby Conynghan Corfield, Plaintiff/Respondent

Liberty Corporate Capital, Ltd., Plaintiff/Respondent

All Underwriters subscribing to Policy No. CRCTX99-128, represented by

Syndicate Nos. 807, 506, 1206, 1173, 718, 190, and 1229, Plaintiff/Respondent

Harvey G. Joseph, Attorney for Defendant/Petitioner

John Hubble, Attorney for Defendant/Petitioner

Richard H. Gateley, Attorney for Plaintiff/Respondent

Carter L. Ferguson, Attorney for Plaintiff/Respondent

Theodore Mack, Attorney for Plaintiff/Respondent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.6 LIST ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 4

A. Nature of the Case and Proceedings Below 4

B. Factual Background 5

REASONS FOR GRANTING THE WRIT 7

A. The Fifth Circuit's 28 U.S.C. § 1332 Ruling Conflicts with *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), and further Exacerbates Circuit Split Between the Second, Fifth, Sixth and Seventh Circuits 7

B. The Fifth Circuits Ruling is contrary to 28 U.S.C. § 1332 13

C. The Fifth Circuit's ruling would circumvent the complete diversity jurisdiction requirement mandated by Congress and this Court and would flood the Federal Courts' with litigation involving solely state law issues 15

CONCLUSION 17

APPENDIX

CIRCUIT COURT ORDER 1a

DISTRICT COURT ORDER 27a

TABLE OF AUTHORITIES

Page

CASES

BANK OF THE UNITED STATES v. DEVEAUX, 9 U.S. 61 (1809) 15

BATH IRON WORKS CORP. v. CERTAIN MEMBER COMPANIES OF THE INSTITUTE OF LONDON UNDERWRITERS, 870 F.SUPP. 3 (D. MAINE 1994) 12, 14

CARDEN v. ARKOMA ASSOC., 494 U.S. 185 (1990) ..*passim*

CARLSBURG RESOURCES CORP. v. CAMBRIA SAVINGS & LOAN ASSN., 554 F.2D 1254 (3RD CIR. 1977) 15

CERTAIN INTERESTED UNDERWRITERS OF LLOYDS LONDON, ENGLAND v. LAYNE, 26 F.3D 39 (6TH CIR. 1994) 12

CERTAIN UNDERWRITERS OF LLOYDS LONDON v. RAYTHEON CO., 2001 WL 1836268 (N.D. CAL. 2001) 11

CHASE MANHATTAN BANK, N.A. v. ALDRIDGE, 906 F.SUPP. 870 (S.D. N.Y. 1995) 11

DIRUGGIERO v. RODGERS, 743 F.2D 1009, 1017 (3RD CIR. 1984) 15

ER SQUIBB & SONS, INC. v. ACCIDENT & CASUALTY INS. CO., 160 F.3D 925 (2ND CIR. 1998) 13

ER SQUIBB & SONS, INC. v. LLOYDS & COS., 241 F.3D 154 (2ND CIR. 2001) 13

GENSTAR CONTAINER CORP. v. CERTAIN UNDERWRITERS OF LLOYDS, 2000 WL 189729 (N.D. CAL. 2000) 11

HUMM v. LOMBARD WORLD TRADE, INC., 916 F.SUPP. 291 (S.D. N.Y. 1996) 11

INDIANA GAS CO. v. HOME INS. CO., 141 F.3D 314 (7TH CIR. 1998) 11, 13

LOWSLEY-WILLIAMS v. NORTH RIVER INS. CO., 884 F.SUPP. 166 (D.N.J. 1995) 7, 10, 12

LUMBERMEN'S MUT. CASUALTY CO. v. ELBERT, 348 U.S. 48 (1954) 15

MAJESTIC INS. CO. v. ALLIANZ INT'L INS. CO., 133 F.SUPP.2D 1218 (N.D. CAL. 2001) 11

MCAUSLIN v. GRINNELL CORP., 2000 WL 1059850 (E.D. LA. 2000) 11

OWEN EQUIPMENT & ERECTION CO. v. KROGER, 437 U.S. 365, 377 (1978) 15

QUEEN VICTORIA CORP. v. INS. SPECIALISTS OF HAWAII, INC., 711 F.SUPP. 553 (D. HAWAII 1989) 12

SAADEH v. FAROUKI, 107 F.3D 52, 59 (D. D.C. 1997) 15, 16

STRAWBRIDGE v. CURTISS, 3 CRANCH 267, 2 L. ED. 435 (1806) 15

TRANSAMERICA CORP. v. RELIANCE INS. CO. OF ILLINOIS, 884 F.SUPP. 133 (D. DEL. 1995).....11

OTHER AUTHORITIES

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1332.....*passim*

Currie, the Federal Courts and the American Law Institute, Part I., 36 U. Chi. L. Rev. 1, 8 (1968).....16

Dallas Glen Hills LP pray's for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on December 29, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 355 F.3d 853 (5th Cir. 2003), and a copy is contained in the Appendix attached hereto. *See* App. 1a. The Appendix also contains a copy of the opinion and order from the United States District Court for the Northern District of Texas. *See* App. 27a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on December 29, 2003. Pursuant to SUP. CT. R. 13.3, this petition for writ of certiorari is timely because it is being filed within ninety days after the Fifth Circuit rendered judgment.

STATUTES INVOLVED

This case involves the diversity jurisdiction statute found at 28 U.S.C. § 1332. The full text of 28 U.S.C. § 1332 is as follows:

> § 1332. **Diversity of citizenship; amount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different states;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in Section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purpose of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to

be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insurer is a citizen, as well as of any state by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State of the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the

same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This is a declaratory judgment action in which Thomas Rokeby Conynghan Corfield ("Corfield") initiated a declaratory judgment action as the lead underwriter of Lloyds Syndicate 190 and as the representative of certain Underwriters at Lloyds of London subscribing to Policy No. CRCTX99-1128 ("Policy") to adjudicate a coverage dispute under a policy of insurance. *See* App. 2a.

On January 27, 2003, the district court entered an order dismissing the declaratory judgment complaint for a lack of subject matter jurisdiction. *See* App. A. The district court found that it lacked subject matter jurisdiction because there was not complete diversity between the parties and therefore dismissed the case without prejudice. *See* App. 2a.

On December 29, 2003, a panel of the Fifth Circuit in an opinion authored by District Judge Zainey, sitting by assignment, reversed the order of the district court and remanded the case for trial holding that in the Fifth Amended Petition the Respondent had satisfied the diversity jurisdiction requirements of 28 U.S.C. § 1332. *See* App. 2a.

B. Factual Background

In August 2000, Petitioner Dallas Glen Hills LP ("DGH") claimed an insured commercial property loss on Lloyds of London Policy CRCTX99-1128. *See* App. 2a. Liberty Corporate Capital, Ltd. ("Liberty") acting through its wholly-owned subsidiary Liberty Syndicate 190 assigned an adjuster to inspect the property. *See* App. 2a. Liberty determined that the policy provided no coverage for the claim. The policy had a $500,000 limit of which Liberty insured 32.79% of the risk. *See* App. 2a.

On August 20, 2002, Thomas Rokeby Conynghan Corfield ("Corfield"), a British subject and "active" underwriter for Syndicate 190, filed a declaratory judgment action on his own behalf and as a representative of certain Underwriters at Lloyds of London seeking a declaration of the party's rights and obligations under the policy. *See* App. 2a. On August 28, 2002, the district court issued an order stating that Corfield's complaint "appears to predicate subject matter jurisdiction upon diversity of citizenship, 28 U.S.C. § 1332, but fails to allege properly the citizenship of defendant. It is also possible that the complaint fails to allege properly plaintiff's citizenship." *See* App. 3a. The district court ordered the complaint repled. *See* App. 3a.

In response to the district court's order, Liberty replaced Corfield as the named plaintiff and filed an amended complaint on its own behalf and as the representative of all other Underwriters subscribing to the policy. *See* App. 3a. Because this amended complaint did nothing to address the jurisdictional

issues raised by the district court, a Third and Fourth amended complaint was filed with Liberty seeking relief on its own behalf and as the lead underwriter of those Underwriters subscribing to the policy. *See* App. 4a.

DGH then filed a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction stating that at least one of the individuals at Lloyds London Syndicate 190 was a Texas resident and that some of DGH's partners were citizens of Texas thereby destroying complete diversity. *See* App. 4a. Facing the fact that diversity of jurisdiction was lacking, Liberty tried one last time to remain in federal court and filed yet another amended complaint requesting a declaratory judgment solely "on its own behalf as the lead underwriter of those Underwriters of Lloyds London subscribing to Policy No. CRCTX99-1128." *See* App. 5a.

Corfield and Liberty amended their complaints five different times within a three month span to change the wording from a clearly representative capacity to more "ambiguous" wording in an effort to keep non-diverse parties in federal court. Liberty's verbal gymnastics did not impress the district court who dismissed the case for lack of subject matter jurisdiction, but the Fifth Circuit reversed and remanded finding that a Lloyds of London entity ostensibly suing only in its "individual" capacity is not required to have complete diversity among all of its members *vis-à-vis* the opposing party in order to satisfy 28 U.S.C. § 1332. *See* App. 2a, 23a.

REASONS FOR GRANTING THE WRIT

Compelling reasons exist for granting certiorari. First, the Fifth Circuit's holding not only further exacerbates a split among the circuit courts of appeals as to how to determine the citizenship of a Lloyds London entity under 28 U.S.C. § 1332 but also is contrary to this Court's decision in *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990). Moreover, the case involves important diversity jurisdiction issues that have not been, but should be, settled by this Court, including whether, by repetitive and creative repleading, the 200 year old Congressional and judicial policy of strictly construing and narrowing diversity jurisdiction will be set aside in favor of opening wide the federal courthouse doors to thousands of lawsuits involving strictly state law claims.

A. The Fifth Circuit's 28 U.S.C. § 1332 Ruling Conflicts with *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), and Further Exacerbates a Circuit Split Between the Second, Fifth, Sixth and Seventh Circuits.

In its opinion, the Fifth Circuit accurately describes the unique *sui generis* nature of Lloyds of London. Nonetheless, perhaps the best discussion and explanation of exactly how a Lloyds of London entity or syndicate works comes from the United States District Court in Lowsley-Williams v. North River Ins. Co., 884 F.Supp. 166 (D.N.J. 1995). As the Lowsley-Williams' Court explained:

> Lloyds of London is not an insurance company in the general sense. Rather, it is an exchange or a market where various

individuals or groups bid on the right to ensure a given risk. Lloyds takes no part in the business of underwriting; policies are underwritten *at* Lloyds and not *by* Lloyds. Thus, policy holders have no contractual relationship with Lloyds.

The insurance policies underwritten at Lloyds are underwritten by members of Lloyds, referred to as "Names". Persons desiring to be Names must pay an entrance fee, keep certain deposits at Lloyds, and meet several specific requirements, including the possession of a certain degree of wealth, in order to become Names. The maximum amount that each Name may underwrite is determined in relation to the Names wealth, in addition to other factors. Since Names assume unlimited liability, Names are liable to the full extent of their personal wealth for any risk undertaken.

For any given contract, each Name is liable only for the percentage of the risk which that Name has agreed to underwrite and for no other portion of the risk assumed by any other Name. The holders of policies reinsured by Lloyds Names thus enter into contractual relationships with the specific Names who have subscribed to the policies for the portion of the risk that each Name has agreed to underwrite.

In order to increase the efficiency of underwriting risk and to combine the resources of numerous underwriters, Names form groups called syndicates. These syndicates are comprised of some 30,000 member investors sometimes called "Underwriters" or "Names" who hope to share in any profit the syndicate might make. Syndicates are neither incorporated nor are they legal entities in and of themselves. There is no contractual relationship among members of a syndicate, between syndicates, or between the policy holder and the syndicate. Syndicates do not assume liability or underwrite risk; Names do.

Within each syndicate, a Managing Agent is responsible for the underwriting and managing of a Names business. The authority of the Managing Agent is either direct, through a contract entered into between the Name and the Managing Agent, or indirect, between the Managing Agent and the Members Agent (who acts on behalf of the Name).

The Managing Agent – a partnership or limited company – designates one of its employees to serve as the Active Underwriter (Underwriter) for the syndicate. The Underwriter is authorized to control the risks for each Name in the syndicate which the Underwriter represents, though no

> Underwriter is an express trustee over funds held on behalf of any Name. In addition, the Underwriter determines the conditions to which a risk will be subject and what percentage of a risk will be assumed by the syndicate on behalf of the Names. The Underwriter also determines what percentage of a risk each Name in the syndicate will assume. Thus, when the underwriter accepts a percentage of a risk, he binds every Name in the syndicate to the full extent of the Name's share. When it comes time to pay a claim, the Underwriter's decision binds all the Names in the syndicate, but only the Names within that syndicate. Each Name's liability is determined by the individual policy and the Name's participating share in the syndicate. The agency between a Name and a Managing Agent is terminated when the Name ceases to be an underwriting member of Lloyds".

Lowsley-Williams, 884 F. Supp. 167-68 (internal citations omitted).

While it may be difficult to determine what a unique entity like Lloyds of London is, it is not difficult to conclude what it is not. It is clearly not a corporation or a trust. Therefore, under this Court's decision in *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990), the citizenship of every member or "name" must be taken into account in determining diversity jurisdiction. Simply stated, any form of unincorporated business

entity is to be treated as a citizen of every jurisdiction in which any member is a citizen. *Carden, supra.* Because there are Texas citizens among the Syndicate members who are part of the Syndicate's group collectively underwriting the insurance policy at issue and there are Texas citizens among DGH's limited partners, and no federal question jurisdiction, the Fifth Circuit erred in holding that diversity jurisdiction exists in this situation.

The Fifth Circuit not only acted in contravention of *Carden*, but its decision is completely at odds with the Seventh Circuit's decision on this identical issue in *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998). In that decision, Judge Easterbrook, writing for the Seventh Circuit, held that under a Lloyd's London plan each and every "Name" comprising the membership of the syndicates' underwriting the insurance policy at issue must be completely diverse in citizenship in order for the district court to have diversity jurisdiction. The Seventh Circuit is not alone in this analysis and conclusion. The following cases have all held that, to determine citizenship of a Lloyds London entity, the citizenship of all members must be included. *Majestic Ins. Co. v. Allianz Int'l Ins. Co.*, 133 F.Supp.2d 1218 (N.D. Cal. 2001); *Certain Underwriters of Lloyds London v. Raytheon Co.*, 2001 WL 1836268 (N.D. Cal. 2001); *Genstar Container Corp. v. Certain Underwriters of Lloyds*, 2000 WL 189729 (N.D. Cal. 2000); *Mcauslin v. Grinnell Corp.*, 2000 WL 1059850 (E.D. La. 2000); *Humm v. Lombard World Trade, Inc.*, 916 F.Supp. 291 (S.D. N.Y. 1996); *Chase Manhattan Bank, N.A. v. Aldridge*, 906 F.Supp. 870 (S.D. N.Y. 1995); *Transamerica Corp. v. Reliance Ins. Co. of Illinois*, 884 F.Supp. 133 (D. Del. 1995); *Lowsley-*

Williams v. North River Ins. Co., 884 F.Supp. 166 (D. N.J. 1995); *Bath Iron Works Corp. v. Certain Member Companies of the Institute of London Underwriters*, 870 F.Supp. 3 (D. Maine 1994); *Queen Victoria Corp. v. Ins. Specialists of Hawaii, Inc.*, 711 F.Supp. 553 (D. Hawaii 1989).

The only circuit court case that holds directly to the contrary is *Certain Interested Underwriters of Lloyds London, England v. Layne*, 26 F.3d 39 (6th Cir. 1994) and now the Fifth Circuit in its decision.

The rationale of the Seventh Circuit's decision in *Indiana Gas* is a sound one and should be approved by this Court in this case. The Seventh Circuit recognized under this Court's decision in *Carden*, that the citizenship of any association other than a corporation or trust must be determined by determining the citizenship of all of its members. Indeed, *Carden* articulated the bright line rule that every association other than a corporation is to be treated like a partnership. General partnerships, limited partnerships, joint stock companies, and unincorporated membership associations are all treated as citizens of every state of which any partner or member is a citizen. *Carden, supra.* While the *Layne* court (and now the Fifth Circuit) concluded that the citizenship of the "Names" were irrelevant to determine diversity jurisdiction, and that only the citizenship of the lead underwriter mattered, the Seventh Circuit cogently explained the logical fallacy of the *Layne* court's conclusion.

The *Layne* rationale supposes that the "Names" are not liable if they are not sued so their citizenship

should not matter. Judge Easterbrook, writing for the Seventh Circuit, explained that that rationale cannot be supported under American law because limited partners cannot be sued for the acts of a partnership and are not exposed to damages beyond loss of their investment, yet their citizenship counts for purposes of diversity jurisdiction under this court's decision in *Carden*. Furthermore, if the inability to sue the other underwriters or "Names" personally means that their interests are not affected by the litigation, it would logically follow that no insured could rely on their promises or use their wealth to support the insurance agreement. Under this logic, the policies written on the London market would be worthless. *See, Indiana Gas*, 141 F.3d at 319.

B. The Fifth Circuit's Ruling is Contrary to 28 U.S.C. § 1332

In its opinion, the Fifth Circuit states it is following the Second Circuit's decisions in *ER Squibb & Sons, Inc. v. Accident & Casualty Ins. Co.*, 160 F.3d 925 (2nd Cir. 1998) (*Squibb I) and ER Squibb & Sons, Inc. v. Lloyds & Cos.*, 241 F.3d 154 (2nd Cir. 2001) (*Squibb II*). The Fifth Circuit holds that because in its fifth amended petition, Liberty, for the first time, claimed it was bringing this declaratory judgment suit solely on its own behalf and not also as a representative of the other underwriters that Liberty's citizenship is the only citizenship that needs to be considered in determining whether diversity jurisdiction exists. The rationale seems to go that since Liberty is the only entity now being represented on the plaintiff's side, the other "non-represented" underwriters under the policy are irrelevant and unnecessary in determining diversity

jurisdiction.

First, the idea that the lead underwriter can simply bring a claim individually and without representing the other underwriters involved in the insurance policy is not only intellectually suspect but if allowed to stand potentially catastrophic in its practical effect. As the court in *Indiana Gas* cogently noted, if all of the underwriters or "Names" were not real parties in interest, it would follow that no insured could rely on their promises or use their wealth to support the insurance agreement. It is illogical to conclude that the other underwriters or "Names" are not real and indispensable parties in interest.

In its statement of jurisdiction to the Fifth Circuit, Liberty stated the amount in controversy exceeds $500,000, but Liberty's portion of liability is 32.79% or a little over $160,000. The other 67 + % of liability or over $340,000 in liability belonged to the rest of the "Names" in the Syndicates, including names that are Texas citizens that would be liable under the policy. Clearly all of the underwriters or names are real parties in interest. *See, Bath Iron Works Corp.*, 870 F.Supp. at 6 (both active and nonactive "Names" face potential unlimited liability under their agreement with Lloyds. In fact, it is the Names investments and personal assets that may ultimately fund any settlement or judgment against Lloyds. Accordingly, it would be absurd to conclude that the Names are merely nominal or formal parties in the litigation.)

C. The Fifth Circuit's Ruling would circumvent the complete diversity jurisdiction requirement mandated by Congress and this Court and would flood the Federal Court's with litigation involving solely state law issues.

Equally dangerous in the Fifth Circuit's rationale is the practical result that will occur if this decision is allowed to stand. For 200 years this Court has steadfastly stood firm in its construction of the Judiciary Acts diversity provision to require complete diversity of citizenship. *See, Strawbridge v. Curtiss*, 3 Cranch 267, 2 L. Ed. 435 (1806); *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990). This interpretation is consistent with Congress's decree that diversity jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship and that Congressional policy calls for strict construction of the diversity jurisdiction statute. *See, Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978).

The diversity jurisdiction of federal courts has roots in the fear of local prejudice towards foreign suiters in state court. *See, Bank of the United States v. Deveaux*, 9 U.S. 61 (1809); *Diruggiero v. Rodgers*, 743 F.2d 1009, 1017 (3rd Cir. 1984). This fear turned out to be largely unfounded and the history of diversity jurisdiction is one of criticism and attempted abolishment. *See, Lumbermen's Mut. Casualty Co. v. Elbert*, 348 U.S. 48 (1954) (Justice Frankfurter concurring); *Saadeh v. Farouki*, 107 F.3d 52, 59 (D. D.C. 1997); *Carlsburg Resources Corp. v. Cambria Savings & Loan Assn.*, 554 F.2d 1254 (3rd Cir. 1977); *Currie*, the Federal Courts and the American Law Institute, Part

I., 36 U. Chi. L. Rev. 1, 8 (1968). Although the many attempts to completely abolish diversity jurisdiction did not succeed, Congress has continued to narrow the basis and scope of 28 U.S.C. § 1332. *See, Saadeh, supra.*

The reasons behind the criticism and concern are readily apparent. Diversity jurisdiction takes solely state law claims and issues, uproots them from the state courts that would naturally hear them, and places them in overcrowded and overworked federal courts all to satisfy a concern of local bias that if it ever existed, clearly does not do so in any real measurement today Justice Frankfurter's concurring opinion in *Lumbermen's Mut. Casualty Co. v. Elbert* cited above is an excellent discussion and critique of diversity jurisdiction and while, in the interest of brevity, it is not reprinted in its entirety in this petition, Petitioner would urge this Court to review Justice Frankfurter's concurrence.

Petitioner's purpose in giving this background of diversity jurisdiction is to sharply focus on the potential problems the Fifth Circuit opinion creates if allowed to stand. This opinion will spur thousands of new diversity jurisdiction based lawsuits in federal court involving Lloyds of London entities (or for that matter any partnership or unincorporated entity) involving solely state law claims thereby further overwhelming an already overwhelmed federal court system with state law claims. This will come at the expense of litigants waiting in the judicial "waiting room" that actually have federal claims to adjudicate. This decision also rewards artful and deceptive pleading and, under its rationale, would spur multiple lawsuits where only one should be sufficient.

If Liberty can sue simply in its "individual" capacity, then all of the other members of the Syndicate may sue or be sued in separate litigation in order to completely adjudicate the claim. Remember, only $160,000 of the $500,000 policy is underwritten by Liberty. If other underwriters are not necessary and indispensable parties, the other $340,000 worth of underwriting would have to be litigated in other lawsuits not only at a great waste of judicial time and resources but also at the risk of inconsistent decisions.

CONCLUSION

This Court is faced with an extremely important diversity jurisdiction case that will have broad nationwide impact upon the docket load of federal district judges everywhere. This Court should grant certiorari in order to end the split in decisions between the Second, Fifth, Sixth and Seventh Circuits, to reaffirm its decision in *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990) and to reaffirm that 28 U.S.C. § 1332 both requires complete diversity and is to be strictly construed. Unless certiorari is granted, the lower federal courts will be free to ignore *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990), the split among the circuits in the area of diversity jurisdiction will only grow wider and the federal district courts in Texas, Louisiana and Mississippi will be overrun with litigation that up until now was determined to belong in state court.

Respectfully submitted,

Harvey Joseph
Counsel of Record
The Law Offices of
Harvey G. Joseph
P.O. Box 814085
Dallas, Texas 75381
(214) 880-8151

John L. Hubble
Hubble & Pistorius
5956 Sherry Lane
Suite 800
Dallas, Texas 75225
(214) 361-1262

Attorneys for Petitioner

(Any footnotes trail end of each document)

No. 03-10185

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS ROKEBY
CONYNGHAN CORFIELD, ET AL.,
Plaintiff-Appellee,

versus

DALLAS GLEN HILLS LP,
Defendant-Appellant.

December 29, 2003, Filed

COUNSEL: For LIBERTY CORPORATE CAPITAL LTD, on its own behalf and as the representative of all other members of those Underwriters at Lloyds, London subscribing to Policy No, CRCTX99-1128, Plaintiff - Appellant: Theodore Mack, Richard Hunt Gateley, Carter Len Ferguson, Brackett & Ellis, Fort Worth, TX.

For DALLAS GLEN HILLS LP, Defendant - Appellee: Harvey Goldwater Joseph, Littler Mendelson, Dallas, TX. John L Hubble, Hubble & Pistorius, Dallas, TX.

JUDGES: Before GARWOOD and JONES, Circuit Judges, and ZAINEY, District Judge. *

OPINION BY: ZAINEY

OPINION: ZAINEY, District Judge:

In this declaratory judgment action, Plaintiff Liberty Corporate Capital, Ltd. ("Liberty") appeals from the district court's grant of Defendant Dallas Glen Hills LP's ("DGH") motion to dismiss for lack of subject matter jurisdiction. The appeal presents an issue of first impression in our circuit regarding how the citizenship of a Lloyd's of London underwriter suing on its own behalf is to be determined for diversity purposes. The district court concluded that the citizenship of every underwriter subscribing to a Lloyd's policy must be considered when determining whether complete diversity exists. We disagree and therefore conclude that the district court erred in dismissing the action. Accordingly, we REVERSE and REMAND.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2000, DGH claimed an insured commercial property loss on Lloyd's of London policy CRCTX99-1128 ("the Policy"). Liberty, acting through its wholly-owned subsidiary Liberty Syndicate 190 ("Syndicate 190") assigned an adjuster to inspect the property. Liberty determined that the policy provided no coverage for the claim. The Policy has a $ 500,000.00 limit of which Liberty insured 32.79 percent of the risk. n1

Thomas Rokeby Conynghan Corfield ("Corfield"), a British subject and "active" underwriter for Syndicate 190, filed a declaratory judgment action on his own

behalf *and as the representative of Certain Underwriters at Lloyd's, London subscribing to the Policy* seeking a declaration of the parties' rights and obligations under the Policy. Corfield alleged that jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. n2 However, Corfield's complaint failed to allege DGH's citizenship. Corfield alleged only that DGH was a Texas limited partnership.

The district court issued an order noting that Corfield had failed to properly allege DGH's citizenship because the complaint did not allege the citizenship of each of DGH's partners. n3 Moreover, the district court questioned whether Corfield had properly pleaded his own citizenship given that he had brought suit both on his own behalf *and as the representative of the other underwriters on the Policy*. Noting that the Seventh Circuit considers the citizenship of every underwriter subscribing to a Lloyd's policy for diversity purposes, Indiana Gas Co. v. Home Insurance Co., 141 F.3d 314, 319 (7th Cir. 1998), the district court ordered Corfield to either plead his citizenship in accordance with the Seventh Circuit's approach or submit a memorandum brief explaining why Corfield's British citizenship alone should control.

In response to the district court's order, Liberty replaced Corfield as the named plaintiff and filed an amended complaint. Liberty, the lead underwriter on the Policy, is a British corporation incorporated, domiciled, and with its principal place of business in the United Kingdom. As with Corfield, Liberty alleged British citizenship and sought relief on its own behalf *and as the representative of all other underwriters subscribing to the Policy*. Recognizing that the

amended complaint did nothing to allay the jurisdictional concerns raised by the district court, Liberty amended its complaint a second time. In the second amended complaint Liberty sought relief on its own behalf *and as the lead underwriter of those underwriters subscribing to the Policy.* Again, however, Liberty failed to affirmatively allege DGH's citizenship, instead alleging that none of DGH's partners were British citizens.

The district court entered a second order, this time threatening to dismiss the action without prejudice unless Liberty amended its complaint to properly allege DGH's citizenship. The district court agreed to defer consideration of Liberty's citizenship given the split in authority concerning how the citizenship of a Lloyd's underwriter is to be determined and given that DGH had not yet moved to dismiss the case. Liberty amended its complaint once more to allege that all of DGH's partners were believed to be citizens of Texas, and that no partner was a citizen of the United Kingdom.

DGH moved to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. DGH argued that for diversity purposes the district court must consider the citizenship of every underwriter subscribing to a Lloyd's policy when determining if complete diversity is satisfied. DGH also asserted that at least one underwriter on the Policy was a citizen of Texas as was at least one of DGH's partners. Thus, DGH argued that complete diversity was lacking.

Hoping to avoid dismissal, Liberty amended its complaint once more. This time Liberty alleged claims *only on its own behalf as the lead underwriter on the Policy*. Liberty deleted all allegations that it was suing in any type of representative capacity on behalf of the other underwriters. Liberty also alleged that all of DGH's partners were either citizens of Texas, Delaware, and New York. The district court nevertheless concluded that the citizenship of each underwriter subscribing to the Policy must be considered for purposes of determining whether complete diversity is satisfied. Because DGH contended that at least one underwriter was a citizen of Texas, the district court concluded that the parties were not completely diverse. The district court therefore granted DGH's motion to dismiss for lack of subject matter jurisdiction. Liberty timely appealed.

DISCUSSION

A. Standard of Review

We review questions of law *de novo*. Wilkerson v. United States of America, 67 F.3d 112, 115 (5th Cir. 1995) (citing Estate of Moore v. Commissioner, 53 F.3d 712, 714 (5th Cir. 1995)). The district court's dismissal for lack of subject matter jurisdiction turned solely on the legal question of how to determine the citizenship for a Lloyd's of London underwriter who sues only on its own behalf. We therefore review the district court's dismissal for lack of subject matter jurisdiction *de novo*. Beall v. United States of America, 336 F.3d 419, 421 (5th Cir. 2003).

B. Principles of Jurisdiction

The federal diversity statute provides that the district courts have original jurisdiction over all civil actions where the matter in controversy exceeds $ 75,000 and is between citizens of a state and citizens or subjects of a foreign state. 28 U.S.C. § 1332(a)(2). It is well-established that the diversity statute requires "complete diversity" of citizenship: A district court cannot exercise diversity jurisdiction if one of the plaintiffs shares the same state citizenship as any one of the defendants. Whalen v. Carter, 954 F.2d 1087, 1094 (5th Cir. 1992) (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806); Mas v. Perry, 489 F.2d 1396, 1398-99 (5th Cir. 1974).

The "citizens" upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy. Navarro Savings Assoc. v. Lee, 446 U.S. 458, 460, 100 S. Ct. 1779, 1781-82, 64 L. Ed. 2d 425 (1980) (citing McNutt v. Bland, 43 U.S. 9, 2 How. 9, 15, 11 L. Ed. 159 (1844); Marshall v. Baltimore & Ohio R. Co., 57 U.S. 314, 16 How. 314, 328-29, 14 L. Ed. 953 (1854); Coal Co. v. Blatchford, 78 U.S. 172, 11 Wall. 172, 177, 20 L. Ed. 179 (1871)). Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy. Id. at 461, 100 S. Ct. at 1782.

The sole issue presented in this case is whether complete diversity requires that the court consider the citizenship of every underwriter subscribing to a Lloyd's of London policy when the lead underwriter sues only on its own behalf. The issue is one of first impression in this circuit and several of our sister

circuits have reached different conclusions. However, before addressing the complex jurisdictional issues raised in this case, a basic understanding of the organizational structure of Lloyd's of London and the unique characteristics of a typical Lloyd's insurance policy is necessary.

C. Lloyd's of London

Lloyds of London is not an insurance company but rather a self-regulating entity which operates and controls an insurance market. John M. Sylvester & Roberta D. Anderson, Is It Still Possible To Litigate Against Lloyd's in Federal Court?, 34 Tort & Ins. L.J. 1065, 1068 (1999). The Lloyd's entity provides a market for the buying and selling of insurance risk among its members who collectively make up Lloyd's. Certain Interested Underwriters at Lloyd's, London v. Layne, 26 F.3d 39, 41 (6th Cir. 1994) (citing Clifford Chance, Doing Business in the United Kingdom, §§ 46.02, 46-6 to 46-8 (Barbara Ford, A.D.M. Forte, & Herbert Wallace eds. 1990); Eileen M. Dacey, The Structures of the Lloyd's Market, in Lloyd's, the ILU, and the London Insurance Market 1990, at 33, 49-0 (PLI Commercial Law & Practice Course Handbook Series No. 555, 1990)). Thus, a policyholder insures *at* Lloyd's but not *with* Lloyd's. Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 39:47 (3d ed. 1995) (citing Bickelhaupt, D., General Insurance 775 (1983, 11th ed.)).

The members or investors who collectively make up Lloyd's are called "Names" and they are the individuals and corporations who finance the insurance market and ultimately insure risks. Sylvester & Anderson, supra,

at 1068. Names are underwriters of Lloyd's insurance and they invest in a percentage of the policy risk in the hope of making return on their investment. E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 929. Lloyd's requires Names to pay a membership fee, keep certain deposits at Lloyd's, and possess a certain degree of financial wealth. Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Surety Co., 177 F.3d 210, 221 (3d Cir. 1999). Each Name is exposed to unlimited personal liability for his proportionate share of the loss on a particular policy that the Name has subscribed to as an underwriter. Squibb, 160 F.3d at 929. Typically hundreds of Names will subscribe to a single policy, and the liability among the Names is several, not joint. Id.

Most Names or investors do not actively participate in the insurance market on a day to day basis. Layne, 26 F.3d at 42. Rather, the business of insuring risk at Lloyd's is carried on by groups of Names called "Syndicates." Id. at 41-42. In order to increase the efficiency of underwriting risks, a group of Names will, for a given operating year, form a "Syndicate" which will in turn subscribe to policies on behalf of all Names in the Syndicate. Squibb, 160 F.3d at 929; Chemical Leaman, 177 F.3d at 221. A typical Lloyd's policy has multiple Syndicates which collectively are responsible for 100 percent of the coverage provided by a policy. Sylvester & Anderson, supra, at 1068. The Syndicates themselves have been said to have no independent legal identity. Id. Thus, a Syndicate is a creature of administrative convenience through which individual investors can subscribe to a Lloyd's policy. A Syndicate bears no liability for the risk on a Lloyd's policy. Rather, all liability is born by the individual Names

who belong to the various Syndicates that have subscribed to a policy.

Each Syndicate appoints a managing agent who is responsible for the underwriting and management of each Name's investments. Chemical Leaman, 177 F.3d at 221. The managing agent receives this authority through contracts with each Name. Id. The managing agent, which is typically a legal entity, appoints one of its employees to serve as the "active" underwriter for the Syndicate. Id. at 222. The active underwriter selects the risks that the Names in the syndicate will underwrite and has the authority to bind all Names in the Syndicate. Id. The active underwriter has the authority to buy and sell insurance risks on behalf of all Names in the syndicate, and to bind the Syndicate members in these transactions. Layne, 26 F.3d at 42.

In practice, since many Names through their respective Syndicates are liable on a Lloyd's policy, the active underwriter from *one* of the underwriting Syndicates is designated as the representative of *all* the Names on the policy. Squibb, 160 F.3d at 929. This single underwriter, called the "lead" underwriter on the policy, is usually the only Name disclosed on the policy with all other Names remaining anonymous. Id. The lead underwriter is typically the first to subscribe to the policy and typically assumes the greatest amount of risk. The Lloyd's corporate entity maintains records on the identity and last known residence of Names insuring risk in the Lloyd's market. That information is kept strictly confidential.

In sum, while an insured receives a Lloyd's "policy" of insurance, what he has in fact received are numerous

contractual commitments from each Name who has agreed to subscribe to the risk. The Names are jointly and severally obligated to the insured for the percentage of the risk each has agreed to assume. The insured does not have to sue each Name individually however to collect on their individual promises because the typical Lloyd's policy contains a clause providing that "any [Name] can appear as representative of all [Names]." Id. Thus, when litigation ensues over a Lloyd's policy, the only named Lloyd's party appearing in the litigation is usually the lead underwriter on the policy. Id. The standard Lloyd's policy states "that in any suit instituted against any one of [the Names] upon this contract, [all the Names] will abide by the final decision of such Court or of any Appellate Court in the event of an appeal." n4 Id. Thus, each Name is contractually bound on an individual basis to the insured to adhere to any adverse judgment reached in the suit notwithstanding that only one Name participates in the litigation as a named party. Thus, a Syndicate, being only a grouping of Names, has no contractual relationship with the insured.

In the instant case, Syndicate 190 is a single-Name Syndicate with Liberty as its sole Name and underwriting member. Liberty is the lead underwriter on the Policy and insures 32.79 percent of the risk which is more than the risk insured by any other Name on the Policy. n5 Liberty is a British corporation with its principal place of business in the United Kingdom. Thus, if only Liberty's citizenship is relevant for jurisdictional purposes, then the parties are completely diverse because DGH is a citizen of Texas, Delaware, and New York. If, however, the citizenship of every Name subscribing to the Policy is relevant for

jurisdictional purposes, then the district court's dismissal was proper as Liberty has not alleged the citizenship of all Names subscribing to the policy, and at least one Name is believed to be a citizen of Texas.

D. Law and Analysis

Several of our sister circuit courts have addressed the Lloyd's citizenship conundrum and have reached differing results based upon differing reasoning. In Certain Interested Underwriters at Lloyd's, London v. Layne, 26 F.3d 39 (6th Cir. 1994), Lloyd's had brought a declaratory judgment action seeking to deny coverage under a policy. Defendants were Tennessee citizens and the plaintiff Lloyd's underwriters were citizens of Great Britain. Defendants, who sought to vacate an adverse judgment, argued that the plaintiff-underwriters were really agents or representatives of the subscribing Syndicates. Thus, Defendants argued that the court should have looked to the citizenship of the subscribing Syndicates in order to determine whether the parties were completely diverse. Analogizing a Lloyd's Syndicate to an unincorporated association, defendants argued that a Lloyd's Syndicate has the citizenship of every Name in the Syndicate.

The Sixth Circuit began its analysis with the "real party to the controversy test." Id. at 42 (citing Carden, 494 U.S. at 187 n.1; Wright, Federal Practice & Proc. § 1556 (2d ed. 1990)). Under this test, if one of the "nondiverse" parties is not a real party in interest, and is purely a formal or nominal party, his presence may be ignored when determining jurisdiction. Id. (citing Salem Trust Co. v. Manuf. Fin. Co., 264 U.S. 182, 68 L. Ed. 628, 44 S. Ct. 266 (1924)). Noting that Federal Rule

of Civil Procedure 17(a) requires that every action be prosecuted in the name of the "real party in interest," the court stated that the "real party in interest analysis turns upon whether the substantive law creating the right being sued upon affords the party bringing the suit a substantive right to relief. Id. at 43 (citing Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984); American Nat'l Bank & Trust Co. v. Weyerhaeuser Co., 692 F.2d 455, 459-60 (7th Cir. 1982); Wright, supra, § 1544 at 340). The Sixth Circuit, citing Erie Railroad v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), concluded that Tennessee law should apply to determine whether the plaintiff-underwriters had a substantive right to relief. Id.

Applying Tennessee law, the Sixth Circuit concluded that the plaintiff-underwriters were liable on the contract because they had functioned as agents for undisclosed principals (the Syndicates). Because under Tennessee law an agent for an undisclosed principal is personally liable on a contract, the underwriters were found to be real parties in interest. Id. at 43. Further, under Tennessee law, once the agent is sued, the principal is no longer liable. Thus, once the agent (underwriter) became the party sued, the principal (Syndicates) had no further interest in the case. Id. Given that the Syndicates had no interest in the case after the underwriter was sued, they were not real parties to the controversy and their citizenship could be ignored. Id. Accordingly, the court looked only to the citizenship of the plaintiff-underwriters when determining whether complete diversity existed.

Four years later, the Seventh Circuit decided Indiana Gas Co. v. Home Insurance Co., 141 F.3d 314 (7th Cir.

1998). Indiana Gas sued its insurers for indemnity on environmental cleanup costs. While the case was on appeal, the parties informed the court that at least one subscribing Name on the Lloyd's policy was a citizen of Indiana--the same state of citizenship as the plaintiff Indiana Gas. The Seventh Circuit focused its analysis on the Syndicates as the appropriate entities to either sue or be sued on a Lloyd's policy. Concluding that a Syndicate had all the characteristics of a limited partnership, the court concluded that a Syndicate has the citizenship of every Name belonging to the Syndicate just as a partnership has the citizenship of every partner. Id. at 317. The court noted that this rule applied to partnerships regardless of whether partners were named in the lawsuit. Id. at 317. The Seventh Circuit interpreted Carden v. Arkoma Associates, 494 U.S. 185, 108 L. Ed. 2d 157, 110 S. Ct. 1015 (1990), as articulating a general rule that every association other than a corporation must be treated like a partnership for citizenship purposes. Id. Thus, according to the Seventh Circuit, the Syndicates must be treated as entities and the citizenship of every subscribing Name must be considered when determining a Syndicate's citizenship. Just as a plaintiff cannot ignore non-diverse partners to save jurisdiction, a plaintiff cannot ignore or dismiss non-diverse Names in a Syndicate. Id. at 317.

In reaching its conclusion, the Seventh Circuit rejected every aspect of Layne, concluding that the Sixth Circuit had failed to factor in that liability *vel non* on a contract does not control the citizenship inquiry. Id. at 319. For instance, limited partners cannot be sued and are not liable for a partnership's acts yet their citizenship cannot be ignored. Id. According to Indiana Gas, the underwriting Syndicates must be treated like

partnerships when determining citizenship. Id. Thus, pursuant to Carden, the citizenship of every Name on the policy must be considered when determining whether diversity is complete.

Later that same year, the Second Circuit decided E.R. Squibb & Sons, Inc. v. Accident & Casualty Insurance Co., 160 F.3d 925 (2d Cir. 1998) ("Squibb I"). In Squibb I, a coverage dispute against Lloyd's had been pending in the district court for nearly sixteen years and had culminated in a jury verdict favorable to Squibb. When the case finally hit the appellate court, the Second Circuit *sua sponte* questioned whether diversity was complete because the lead underwriter had been sued as a representative of all underwriters who had subscribed to the policy. Id. at 928. The Second Circuit rejected the Layne court's analysis and agreed with Indiana Gas in so far as the Seventh Circuit had concluded that a lead underwriter sued in a *representative* capacity must reflect the citizenship of every Name subscribing to the policy. Id. at 939-40. After all, "federal courts must look to the individuals being represented rather than their collective representative to determine whether diversity of citizenship exists." Squibb I, 160 F.3d at 931 (citing Northern Trust Co. v. Bunge Corp., 899 F.2d 591, 594 (7th Cir. 1990)). Because the underwriter was sued as representative, and because the record failed to reflect the citizenship of all Names, subject matter jurisdiction was questionable.

However, the Second Circuit went beyond Indiana Gas and surmised that the jurisdictional problems surrounding Lloyd's grew only out of the lead underwriter's decision to sue in a representative

capacity. In other words, the Squibb I court postulated that where the lead underwriter sues or is sued only in his individual capacity, the existence of jurisdiction depends solely on the lead underwriter's citizenship. Id. at 936. It would not depend on the status of the other Names who, though members of the Syndicates at risk, would not be direct parties to the litigation. Id. The Second Circuit rejected the notion that the non-party Names' citizenship would have to be considered simply because they too would be bound by whatever judgment is rendered against the only Name sued. Id. The Second Circuit reasoned that a federal court does not lose jurisdiction simply because a non-diverse non-party is contractually bound to indemnify the diverse parties. Id. As long as the party being sued is a real party to the controversy, the fact that the case will determine the rights of non-diverse litigants through collateral estoppel or preclusion does not affect jurisdiction. Id. Because the lead underwriter is severally liable on the policy, he is a real party to the controversy. Id. at 937. Thus, where he appears in the litigation solely on an individual basis, only his citizenship need be considered. Id.

The Squibb I court also found that the Supreme Court's Carden decision was not an impediment. Because Carden applies only to formal entities created under state law, it does not apply in a Lloyd's context where no formal entity is a party to the suit. Id. at 937. The Squibb I court was unconvinced that Syndicates are formal entities because "the contractual provision that obligates a Name to abide by the judgment rendered against any other Name runs vertically between the insured and each Name, not horizontally from Name to Name." Thus, a Lloyds policy taken as a whole is really

"a series of independent bilateral contracts from insurer to insured." Id. The Names are bound in contract to the insured and not to each other and a Syndicate bears no liability. See id. Therefore, taken as a whole, a Syndicate does not constitute an entity. Id. Rather than render its decision, the Second Circuit concluded that the case should be remanded to the district court for a determination in the first instance of whether British law and the policy in dispute would allow a suit to proceed against a Name individually and whether the non-party names could be dismissed as dispensable parties. Id. at 936-37, 940.

On remand, the district court concluded that British law and the contracts at issue would permit the suit to proceed against a Name in his individual capacity. E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 1999 U.S. Dist. LEXIS 8333, No. 82 Civ. 7327JSM, 1999 WL 350857, at *5 (S.D.N.Y. June 2, 1999), aff'd, 241 F.3d 154 (2d Cir. 2001). The court went on to conclude that the other Names were dispensable parties under Rule 19(b) because all Names were contractually bound by the policies and by the rules of Lloyd's to abide by any judgment rendered against the lead underwriter. 1999 U.S. Dist. LEXIS 8333, [WL] at *13. Thus, dismissing the *representative* claims against the lead underwriter would have no practical effect on any other Name. Id. Because the citizenship of the lone underwriter was diverse from every other opposing party, diversity jurisdiction was met. n6 The Second Circuit ultimately affirmed. E.R. Squibb & Sons, Inc. v. Lloyd's & Cos., 241 F.3d 154 (2d Cir. 2001) ("Squibb II").

Between Squibb I and Squibb II, the Third Circuit decided Chemical Leaman Tank Lines, Inc. v. Aetna

Casualty & Surety Co., and held that the citizenship of the underwriter sued on the policy is the only citizenship relevant for diversity purposes. 177 F.3d at 223. The insured had sued "Certain Underwriters at Lloyd's, London subscribing to Insurance Policies [specifically enumerated]." Id. at 216. The parties later stipulated to an amended complaint in which one of the individual underwriters "on behalf of himself and all other Underwriters at Lloyd's, London, subscribing to [specifically enumerated policies]" substituted for "Certain Underwriters." The parties also stipulated that any final judgment for or against the sole party underwriter would be binding on those underwriters subscribing to the enumerated policies. n7 Prior to the entry of final judgment, the parties brought to the court's attention a decision rendered by another court in the same district in which the district court held that the citizenship of all underwriters on a Lloyd's policy had to be taken into account in determining diversity jurisdiction, Lowsley-Williams v. North River Ins. Co., 884 F. Supp. 166 (D.N.J. 1995). No party, however, challenged jurisdiction and the court proceeded to enter final judgment.

On appeal, the Third Circuit, without reference to any other circuit court decision, held that the citizenship of the underwriter sued on the policy was the only citizenship relevant for diversity purposes. 177 F.3d at 223. Although the amended complaint alleged that the underwriter was there individually as well as in a representative capacity, the Third Circuit concluded that the claim was really only one against the named underwriter individually. Id. at 222. The court reasoned that the plaintiff had not brought suit against the underwriter as an agent of the other underwriters or

against the Syndicates of which they were members or against the underwriter as agent for his Syndicate. Id. at 222 & n.14. The court also noted that the Names shared no common liability, each being liable only for the share of the risk each had assumed. Id. at 222. Moreover, the district court had not certified a defendant class of underwriters, which according to the Third Circuit, would have been the only way that the underwriter could have truly been sued in a representative capacity. See id. Thus, the claim against the underwriter was one against him individually. And because each Name was liable only for his share of the risk, and because joint and several obligors are not necessary defendants under Rule 19(a), plaintiff was entitled to sue less than all of the Names. Id. at 223 n.16.

Further, the Third Circuit concluded that the parties' stipulation that the judgment against the named underwriter would bind all others did nothing to affect jurisdiction because the stipulation did not place any of those other underwriters before the court. Id. at 223. Moreover, the named underwriter was not a party sued only to manufacture jurisdiction because the named underwriter was a Name who had subscribed to the policy thereby giving the plaintiff a valid claim against him. See id. n.16. Because the named underwriter was the only underwriter named in the complaint, only his citizenship was relevant to the exercise of diversity jurisdiction. Id. at 223.

In the current posture of the instant case, Liberty is suing only in its individual capacity as lead underwriter on the Policy. Thus, Liberty's case is presented to us in the exact procedural posture suggested by the Second

Circuit in Squibb I and ultimately approved by the Second Circuit in Squibb II. We find the Second Circuit's approach to be based upon sound reasoning.

At the outset, Liberty is without question a real and substantial party to the controversy. Aetna Cas. & Surety Co. v. Iso-Tex, Inc., 75 F.3d 216, 218 (5th Cir. 1996) (citing Navarro Savings Ass'n, 446 U.S. at 460, 100 S. Ct. at 1781). Liberty is a subscribing Name on the Policy and is therefore directly bound via contract to DGH, the insured. Liberty's personal stake in the outcome is approximately $ 163,950.00. Therefore, this is not the situation where an agent with no personal stake in the controversy attempts to sue on behalf of his non-diverse principal in order to create diversity. Chemical Leaman, 177 F.3d at 223 n.16; see Navarro Savings, 446 U.S. at 465, 100 S. Ct. at 1784. Liberty faces actual liability for the risk it assumed and therefore is a real party to the controversy. n8

Moreover, pretermitting the Lloyd's issue, the district court would have diversity jurisdiction over Liberty's individual claim against DGH. Liberty is a British citizen and DGH is a citizen of Texas, Delaware, and New York. Thus, Liberty and DGH are completely diverse in citizenship. Further, Liberty's potential liability on the Policy is $ 163,950.00, a sum well in excess of the jurisdictional amount.

Given that Liberty is a real party to the controversy and that the district court would have jurisdiction over Liberty's individual claim, the next logical question is whether a Name on a Lloyd's policy can be sued individually by an insured. n9 In Indiana Gas, the Seventh Circuit answered that question in the negative

but we find no legal support for such a conclusion--a conclusion reached without discussion, analysis, or citation to legal authority. As the district court in Squibb observed, "it would be a strange law indeed that would hold that an individual, who had so clearly bound himself individually by contract, could not be sued individually to enforce that contractual obligation." Squibb, 1999 U.S. Dist. LEXIS 8333, 1999 WL 350857, at *5. Indeed, the very essence of a Lloyd's policy is that it is a collection of individual contracts running between the insured and each Name. Moreover, the estoppel provision contained in every Lloyd's policy, i.e., that each Name will abide by a judgment rendered against any other Name, would not be necessary if litigation were always required to proceed against an underwriter in a representative capacity.

The severability of each Name's liability to the insured lends further support to the conclusion that a Name can be sued individually. As discussed above, a Lloyd's policy is actually a collection of many bilateral contracts running between the insured and each Name. The Names contract directly with the insured and each Name contracts independently of any other Name. Because each Name's liability is several, Liberty's obligation to DGH is independent of any other Name's obligation to the insured. Simple logic allows for no other conclusion but that an insured can sue a Name individually.

Having determined that an insured can sue a Name individually, it does not follow that the citizenship of the remaining Names on the Policy who are not parties to the case and are not before the court is relevant to determining whether the parties are completely

diverse. The fact that the Names' contracts with the insured and the rules of Lloyd's are structured such that the other Names are affected by the judgment against a single Name does not bring those other parties before the court or make them relevant for the citizenship determination. Squibb I, 160 F.3d at 936-37; Plains Growers, Inc. v. Ickes--Braun Glasshouses, Inc., 474 F.2d 250, 252 (5th Cir. 1973) ("The citizenship of one who has an interest in the lawsuit but who has not been made a party to the lawsuit . . . cannot be used . . . to defeat diversity jurisdiction."); Chemical Leaman, 177 F.3d at 223. The fact that other parties are bound by a judgment against one obligor or forced to indemnify an obligor is insufficient to bring their citizenship into consideration when they are not parties to the suit. Squibb I, 160 F.3d at 936 (citing Wheeler v. City of Denver, 229 U.S. 342, 33 S. Ct. 842, 57 L. Ed. 1219 (1913)). n10

We reached a similar result in Aetna Casualty & Surety Co. v. Iso-Tex, Inc., 75 F.3d 216 (5th Cir. 1996). In Aetna Casualty, Aetna was one of many members of an unincorporated insurance association that insured the risk at issue. Aetna brought a declaratory judgment action against the insured "as a member of [the association] . . . for itself and all other members of such association." Id. at 218. While Aetna was diverse from the all defendants, other members of the association were not of diverse citizenship. We held that complete diversity was satisfied because neither the association nor the other members were parties to the suit. Id. We found Aetna's status as a representative to be no impediment to jurisdiction because Aetna's position was analogous to that of a class representative under Federal Rule of Civil Procedure 23.2. Under Rule 23.2

the citizenship of unnamed class members is disregarded. Id. (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 364-66, 41 S. Ct. 338, 341-42, 65 L. Ed. 673 (1921); Calagaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962)). n11 Because Aetna was potentially liable for its share of the risk, it was a "real and substantial" party to the controversy. Because Aetna was diverse from all defendants, the Court had jurisdiction over Aetna's claim without regard to the citizenship of any non-parties.

The Supreme Court's decision in Carden v. Arkoma Associates does not require a contrary result. In Carden, the Supreme Court held that the citizenship of every partner in a limited partnership must be considered for diversity purposes. 494 U.S. at 195-96, 110 S. Ct. at 1021. In so holding, the Supreme Court clarified that every artificial entity, other than a corporation, takes its citizenship from all of the members comprising the entity. Id. DGH argues that Carden compels the conclusion that every Name in a Syndicate must be considered because a Syndicate is an artificial entity. Assuming *arguendo* that a Syndicate is an artificial entity, a conclusion in and of itself open to debate, see Squibb I, 160 F.3d at 929; Chemical Leaman, 177 F.3d at 221, the citizenship of the Syndicates is of no relevance because they play no role in litigation over a Lloyd's policy. It is well-settled that Syndicates are not liable on Lloyd's policies--only individual Names are liable even though they subscribe to risks via Syndicates. The insured has no contractual relationship with a Syndicate because Syndicates do not insure risks. Thus, an insured has no claim against a Syndicate for coverage under a Lloyd's policy. While Carden might apply if the citizenship of the Syndicates

were relevant, it does not apply to make the citizenship of the other non-party Names, who are not members of an entity currently before the court, relevant to diversity jurisdiction.

DGH's reliance on Royal Insurance Co. v. Quinn-L Capital Corp., 3 F.3d 877 (5th Cir 1993), is likewise misplaced. In Royal we held that the citizenship of an attorney in fact through whom a group of underwriters acts to issue insurance is irrelevant for jurisdictional purposes. Id. at 882-83. The plaintiff was a Lloyd's-type plan organized under Texas law. Under Texas law such plans are unincorporated associations. Because the association itself was a party to the suit, we naturally concluded that the citizenship of each underwriter had to be considered for diversity purposes. Id. at 883. The citizenship of the association's attorney-in-fact was irrelevant because he was not a member of the association. Given that Royal dealt with the citizenship of an association as a party, Royal has no bearing on whether the citizenship of all Names on a Lloyd's of London policy must be considered when an underwriter is sued individually.

In sum, the district court had subject matter jurisdiction over this claim because DGH is alleged to be a citizen of Texas, Delaware, and New York, and Liberty is alleged to be a citizen of the United Kingdom. Liberty's 32.79 percent of risk is approximately $ 163,950.00, an amount well in excess of the jurisdictional amount. The other subscribing Names are not parties before the Court and their citizenship need not be considered when determining whether the parties are completely diverse. Thus, the district court

erred in dismissing the action for lack of subject matter jurisdiction.

REVERSED AND REMANDED.

Footnotes

* District Judge of the Eastern District of Louisiana, sitting by designation.

n1 Liberty subscribed to a percentage of risk greater than that assumed by any other Name subscribing to the Policy. Thus, Liberty controls all decisions with regard to claims made under the Policy and the prosecution or defense of lawsuits.

n2 28 U.S.C. § 1332 provides in pertinent part:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of or value of $ 75,000, exclusive of interest or costs, and is between—

. . .

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States an in which citizens or subjects of a foreign state are additional parties . . . .28 U.S.C. § 1332(a)(2), (3).

n3 Because DGH is a limited partnership, it assumes the citizenship of each of its partners. See Carden v.

Arkoma Assoc., 494 U.S. 185, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990).

n4 The policy at issue in this litigation is not part of the record. However, Liberty submitted an affidavit in response to DGH's motion to dismiss. In its affidavit, Liberty asserts that DGH's policy contains the standard Lloyd's language and provisions regarding the Names' willingness to be bound by a judgment against any other Name.

n5 Liberty's potential liability on the Policy is at least $ 163,950.00.

n6 The court also noted that the claim against the individual Name met the amount in controversy requirement. See Squibb, 1999 U.S. Dist. LEXIS 8333, 1999 WL 350857, at *5.

n7 The Third Circuit did not mention the contractual provision typically contained in a Lloyd's policy in which each Name agrees to abide by a judgment rendered against any other Name.

n8 It is unclear from the record whether Corfield, the original plaintiff, was a real party to the controversy. Although Corfield is referred to as the active underwriter for Syndicate 190, Liberty is the sole Name in Syndicate 190. Thus, Corfield might very well have had no personal stake in the litigation.

Given that this matter is before us solely on the diversity jurisdiction issue, this Court expresses no opinion as to whether Liberty's declaratory judgment

action presents a justiciable controversy between the parties.

n9 Neither party briefed whether an insured can sue a Name individually. As previously noted, this is a declaratory judgment action brought by Liberty against the insured. Thus although the Court's analysis is often structured in terms of an insured suing on a Lloyd's policy, all principles should apply equally to a declaratory judgment action brought by the insurer against the insured. Neither party has suggested otherwise.

n10 The "real party to the controversy" test does not require a federal court to consider the citizenship of non-parties who have an interest in the litigation or might be affected by the judgment. The "real party to the controversy" test requires consideration of the citizenship of non-parties when a party already before the court is found to be a non-stake holder/agent suing only on behalf of another. See Navarro Savings, 446 U.S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425.; see also Carden, 494 U.S. at 188 n.1, 110 S. Ct. at 1018 n.1 (rejecting application of the real party to the controversy test for determining the citizenship of a limited partnership).

n11 Of course in the instant case, Liberty is suing only on behalf of itself having dropped all allegations that it intends to sue as a representative of the other subscribing Names.

Civil Action No. 3:02-CV-1781-D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

THOMAS ROKEBY CONYHGHAN CORFIELD,
Plaintiff,

VS.

DALLAS GLEN HILLS, L.P.,
Defendant.

January 24, 2003, Decided
January 24, 2003, Filed; January 27, 2003, Entered

COUNSEL: For Thomas Rokeby Conynghan Corfield, Liberty Corporate Capital, Ltd., Plaintiffs: Richard H Gateley, LEAD ATTORNEY, Brackett & Ellis, Fort Worth, TX.

For Dallas Glen Hills LP, Defendant: John L Hubble, LEAD ATTORNEY, Hubble Pistorius, Dallas, TX.

For Dallas Glen Hills LP, Third Party Plaintiff: John L Hubble, LEAD ATTORNEY, Hubble Pistorius, Dallas, TX.

JUDGES: SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE.

OPINION BY: SIDNEY A. FITZWATER

OPINION:

ORDER

Defendant's motion to dismiss for lack of subject matter jurisdiction presents the question whether plaintiff's citizenship is based on that of the lead underwriter of a Lloyd's, London syndicate or on the citizenship of each underwriter. The court follows the majority of courts that hold that diversity jurisdiction is based on the citizenship of each Lloyd's underwriter. Because plaintiff concedes that at least one underwriter is a Texas citizen, and at least one limited partner of the defendant is a Texas citizen, the court holds that it lacks subject matter jurisdiction and dismisses this case without prejudice.

I

Plaintiff Thomas Rokeby Conyhghan Corfield ("Corfield") initiated this declaratory judgment action by filing a complaint against defendant Dallas Glen Hills, L.P. ("DGH"). He invoked this court's subject matter jurisdiction based on diversity of citizenship. The court issued an order requiring Corfield to replead because he had not properly pleaded diversity jurisdiction. It held that his complaint was defective at least because he had failed to plead properly the citizenship of defendant DGH. Because DGH was alleged to be a Texas limited partnership, Corfield was required to allege the citizenship of each of its limited partners. The court also noted that it was possible that Corfield had failed to plead properly plaintiff's citizenship. This was so because Corfield brought this action on his own behalf as the lead Underwriter of

Lloyd's Syndicate 190 and as the representative of Certain Underwriters at Lloyd's, London. The court noted that some circuits, and several district courts, had similarly held that the citizenship of underwriting syndicates at Lloyd's, London must be treated like limited partnerships for purposes of determining their citizenship, although one circuit had concluded that a Lloyd's syndicate is only a citizen of the state in which its managing/lead underwriter is a citizen. The court directed Corfield either to plead citizenship in accordance with the majority rule or, at the time he cured the defect in pleading DGH's citizenship, submit a letter brief that explained why this court should conclude that his British citizenship alone controls.

Plaintiff thereafter filed an amended complaint and a letter brief. The pleading changed the name of the plaintiff from Corfield to Liberty Corporate Capital, Ltd. ("Liberty"). Liberty asserted that it was prosecuting the suit on its own behalf and as lead underwriter of those Underwriters at Lloyd's, London subscribing to Policy No. CRCTX 99-1128. It stated in the letter that there appeared to be at least one individual subscribing to the risk who was a Texas citizen. In response, the court issued an order stating that, due to the split of authority concerning how the citizenship of Underwriters at Lloyd's, London was to be determined, it was willing to defer consideration of plaintiff's proper citizenship, at least in the absence of a motion to dismiss filed by DGH. The court rejected, however, plaintiff's assertion that a Texas limited partnership should be treated as a corporation. Accordingly, it directed plaintiff to replead to allege properly the citizenship of all limited partners and that

he could not do so inferentially (i.e., by stating that no partner is a citizen of the United Kingdom).

Liberty filed another amended complaint in which it based diversity on the British citizenship of Liberty and attempted to plead properly the citizenship of DGH's limited partners.

DGH moves to dismiss this action for lack of subject matter jurisdiction, contending that one member of the Lloyd's, London syndicate is a Texas citizen, thus destroying complete diversity because at least one of defendant's limited partners is a Texas citizen. n1

II

To have diversity jurisdiction, there must be complete diversity of citizenship between all plaintiffs and all defendants. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74, 57 L. Ed. 2d 274, 98 S. Ct. 2396 (1978); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806); *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 555 (5th Cir. 1985). The majority of circuit and district courts hold that the citizenship of a Lloyd's, London syndicate is based on that of each underwriter. *See, e.g., Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 317 (7th Cir. 1998); *Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 160-61 (2d Cir. 1998). Liberty concedes in its letter to the court that at least one underwriter appears to be a Texas citizen. n2 DGH asserts in its motion to dismiss that at least one underwriter is a Texas citizen, and plaintiff in its response does not deny this allegation. Accordingly, the court lacks diversity jurisdiction and dismisses this case without prejudice.

* * *

DGH's motion to dismiss is granted, and this action is dismissed by judgment filed today.

SO ORDERED.

January 24, 2003.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

JUDGMENT

For the reasons set out in an order filed today, it is ordered and adjudged that this action is dismissed without prejudice.

Taxable costs of court, as calculated by the clerk of court, are assessed against plaintiff.

Done at Dallas, Texas this 24th day of January, 2003.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

Footnotes

n1 Liberty filed an *ex parte* motion for leave to conduct discovery on jurisdiction, by which it seeks to discover jurisdictional facts about DGH's limited partners. DGH moves to strike plaintiff's amended complaints on the ground that, without leave of court, plaintiff exceeded the scope of what the court directed be done by way of amendment. Liberty has filed a motion for leave to file

an amended complaint, in the event the court decides to grant the motion to strike. In view of its disposition of DGH's motion to dismiss, the court need not decide the remaining motions, and they are denied without prejudice as moot.

n2 The letter states, in pertinent part:

if the court follows [*Indiana Gas*], diversity jurisdiction will not exist given the fact that there appears to be at least one individual subscribing to the risk who is a Texas resident and, presumably, a Texas citizen.